PARTICIPATOR

October 2010

RETALIATORY DISCHARGE CLAIM FAILS BEFORE EIGHTH CIRCUIT

North Dakota law protects employees from wrongful discharge in violation of public policy. To win such a case, an employee must establish a clear public policy that would be violated if the employer's adverse employment action was allowed to stand. Is it sufficient if the employee's protected conduct was simply one factor in his termination, or must it be the determinative factor? Read on to learn how the Eighth Circuit addressed this and other issues in a recent decision. (While this case arose in Iowa, the law in North Dakota is very similar).

Questionable performance leads to warning letters.

Wyatt Yon was a sales counselor for Principal Life Insurance Company for several years. He was hired to handle incoming customer calls at the company's call center. Operators obtain certain information from customers, and calls are then routed to sales counselors based on the caller's account balance. High-level counselors receive calls from customers with higher account values, while lower-level counselors service smaller customer accounts.

Yon had a history of performance-related problems with Principal. From 1999 through 2005, he apparently violated various rules and engaged in other conduct that led the company to place him on official warning status, including probation several times, for behaviors that included customer service problems, failure to meet sales goals, and unprofessional language.

When Yon was unable to improve his sales numbers by early April 2005, he was terminated. He then sued Principal for wrongful termination in violation of public policy as well as violations of the Fair Labor Standards Act, the Family and Medical Leave Act (FMLA), and the Iowa Wage Payment Collection Act. The federal district court dismissed all his claims before trial. He then appealed the wrongful termination claim to the Eighth Circuit.

Insufficient evidence of public policy

To prove his wrongful discharge claim, Yon had to establish the following elements under Iowa law:

(1) The existence of a clearly defined public policy that protects the activity he engaged in;
(2) An employment action that would undermine the policy;
(3) Termination for participating in the protected activity; and
(4) No other justification for the termination.

Yon also needed to show that his protected conduct was the determinative factor in the decision to terminate him.

Yon pointed to evidence that he filed a claim under the Iowa Wage Payment Collection Act and sent complaints to the U.S. Department of Labor (DOL) about FMLA violations and alleged persistent mistakes in transactions that affected the retirement accounts of Principal customers. (The company later did an internal investigation and concluded there were no procedural errors.) Yon also argued that Principal had destroyed his opportunities to meet sales goals by routing higher-value customer calls away from him and giving them to favored sales counselors.

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The court observed that Iowa public policy would protect Yon's right to complain about violations of federal law and that his right to do so would be undermined by if he was fired for it. However, Principal asserted that he failed to meet minimum productivity standards required of sales counselors and that his termination had nothing to do with any legally protected activity.

The court concluded that Yon hadn't produced credible evidence from which a reasonable juror could conclude that his protected activity was the reason for his termination. According to the court, there was nothing in the record other than "mere conjecture" that showed Principal was manipulating his sales calls in reaction to his federal agency complaints. While Yon produced affidavits from former coworkers that criticized Principal's call-routing system, the court found they offered nothing but conclusory allegations in support of his claims. Further, the court pointed to evidence that Yon had been subjected to discipline at least five times before he ever contacted the DOL. According to the court, "his later incidents of discipline were attributable to his workplace behavior and his failure to meet sales goals, the same themes as his earlier instances [of discipline]."

The coworker affidavits Yon produced contained nothing more than subjective criticism of Principal's call-routing system. Of even greater significance to the court was the fact that Yon had conceded that he didn't meet the sales expectations set forth in his November 2004 warning and his February 2005 final warning. In each instance, his sales remained below the minimum productivity standards.

Yon also undercut his own claims when he initially complained that his sales lagged because Principal was managing his call volume. However, he later alleged that his calls were adversely affected because of retaliation for the second complaint he made to the government. Consequently, the court found that he failed to prove that his termination resulted from protected activity and dismissed his claim. *Yon v. Principal Life Ins. Co.*, 2010 U.S. App. LEXIS 9878 (8th Cir., 2010).

Employment tip

Perhaps of greatest interest in this case is what the company did correctly to avoid liability for wrongful discharge.

Documentation. A theme we continuously preach is the importance of documentation of poor performance. The Principal managers did a good job documenting evidence of Yon's performance problems. His personnel file contained several written warnings establishing his failure to meet expected performance criteria. As a consequence, he couldn't claim a "misunderstanding" or a credibility dispute over whether his performance was adequate. Don't fool yourself. No matter how articulate your managers are, clear documentation will always speak louder than their testimony if you're called to offer proof of an employee's poor performance.

Legitimate nondiscriminatory rationale. Principal not only documented Yon's performance but also articulated clear nondiscriminatory reasons for his treatment. While Yon shouldered the burden of proving a wrongful termination in violation of public policy, Principal took substantial steps to establish legitimate reasons for his termination. Yon was employed at will, so the company could have terminated his employment at any time for virtually any nondiscriminatory reason. However, it didn't stand on the at-will concept alone. It made sure it had legitimate reasons for his discharge.

Don't succumb to the traditional employer argument that "we don't need a reason to discharge if the employee is employed at will." While that may be technically true, at least from a legal perspective, you should always have a clear reason for terminating an employee. If only from a fairness perspective, you always want a legitimate reason for discipline to send the right message to your workforce. In addition, training your managers to make sure they always have legitimate nondiscriminatory reasons for any type of discipline will instill a workplace culture of fairness and accountability.

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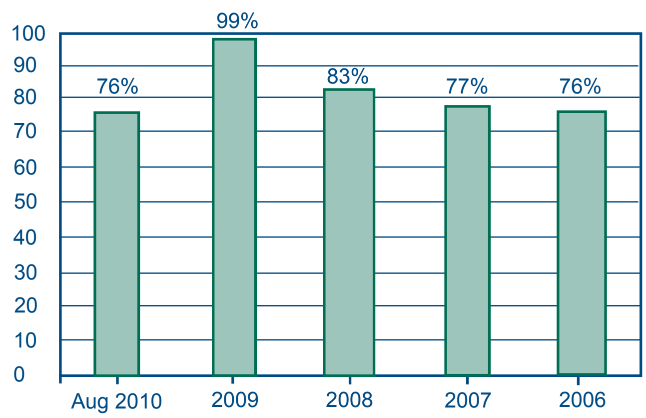
Employee buy-in on performance objectives. Principal also did a good job of getting Yon to buy in to the performance objectives that were originally set for him. At various points in the record, he acknowledged the performance criteria and conceded that he failed to meet the sales goals designed to measure his performance. While he argued that other factors led to his performance failures, there was no dispute about what he was required to do. Also, the performance measurements showed that he failed to meet those goals. Principal again took steps to reduce its potential legal exposure by locking Yon into his written performance objectives and securing his admission that he failed to meet those objectives.

Accurate performance data. Finally, Principal recorded accurate performance data showing that Yon failed to meet expectations. Many employment cases are contested on the basis that the employer didn't correctly assess the employee's performance. The best way to avoid such disputes is to produce written data objectively measuring the employee's work. Also, confirm with the employee that the data is accurate. Do your business a favor by instituting procedures to precisely capture and measure employee performance. Give your employees the opportunity to check it periodically, thereby reinforcing your position that the data is accurate and not subject to dispute. Objective performance data can be your best line of defense in refuting many claims of wrongful discharge or discrimination.

Principal took the right steps to push away Yon's wrongful discharge claim. Employers that make the effort to identify legitimate work goals and to measure performance provide themselves with a protective barrier against employment claims. *Reprinted courtesy of North Dakota Employment Law Letter. For subscription information, please call 800-274-6774 or click to www.HRhero.com.*

FINANCIAL INSIGHTS

COMBINED RATIO



The operating ratio is the sum of the company's loss and expense ratio and indicates the profitability of NDIRF's operations without investment income. A ratio greater than 100% means that losses and expenses exceed premium income. Regulatory guidelines state that a company's combined ratio should be less than 96%. As the graph shows, NDIRF's combined ratio has been consistently below that guideline.

FROM THE CEO

Regular readers of the Participator know that we frequently feature articles covering various aspects of employment-related litigation, as we have in this issue. There are a couple of primary reasons for all this attention: First, these types of claims are expensive to defend and the possibility exists that successful claimants could receive significant damage awards. Second, these claims are highly preventable if sufficient attention is given to development and application of appropriate policies and procedures.

I mention the above as preamble to calling your attention to three new online resources developed in 2010 that will provide assistance to NDIRF members in dealing with employment-related matters. The NDIRF Public Employers Handbook and NDIRF Public School Employers Handbook, intended as quick reference guides, were revised this year and are posted on our website (www.ndirf.com). Also available on the NDIRF website is the Human Resources Reference Guide for Local Governments in North Dakota – a more comprehensive treatment of human resources topics made possible by a Bremer Foundation grant received and administered by the North Dakota Association of Counties. These are the best tools we have ever had so easily available on this subject and I encourage you to visit our website to take them for a test-drive.

Before you promote, ask these questions

You’ve got an employee with promise, but you don't want to promote him or her prematurely. Consider these issues before making a decision:

- **Is the person prepared for the new job?** Managers often reward hard work and enthusiasm by placing someone in a job without the proper training.
- **Does the person even want the job?** Some workers like to submit ideas but don’t want to be responsible for carrying them out. Others will jump at the chance to move up the ladder.
- **What do your fellow managers think?** Get some feedback on your idea before you act. Your colleagues may ask questions you haven’t raised.
- **What does the employee want in a career?** Some want to advance for the money, others because they’re seeking additional responsibility. Know the reasons why people want to move into new positions.

Make your decision with care. There’s nothing much worse than promoting someone to a job when they aren’t qualified to do it, then attempting to return to the way things were before the promotion.

Mark Your Calendar

Oct

10-13: ND Association of Counties Annual Conference, Ramkota Inn, Bismarck

29-30: ND School Board Association Annual Convention, Ramkota Inn, Bismarck

Dec

09: NDIRF Board of Directors Meeting
NDIRF offices, Bismarck

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